Ameren Companies Comments Regarding the Illinois Commerce Commission Authority to Implement the Sustainable Energy Plan, Cost Recovery, and Prudence Review

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There are at least two provisions of the Illinois Public Utilities Act ("Act") that could, in the right circumstances, serve as a basis for adoption of Sustainable Energy Plan ("SEP") by the Illinois Commerce Commission ("ICC" or "Commission"). In addition, the ICC could promote an agenda that calls for particular supply sources through the use of its authority over utility cost recovery. However, there are also bases for opposing an attempt by the ICC to implement such a plan.

It is axiomatic state agencies are "creatures of statute" that have only those powers granted them by the legislature. The Commission's jurisdiction is limited to the expressed powers granted it by the legislature through the Act. The Commission has only the jurisdictional powers that the legislature has expressly granted. *Business and Professional People for the Public Interest, et al. v. Illinois Commerce Commission*, 136 Ill. 2d 192, 201, 555 N.E. 2d 693, 697 (1990). Stated differently, "The Commission is the administrative agency responsible for setting the rates utilities charge their customers. It is governed by the Public Utilities Act . . ., in which the legislature had enunciated the Commission's powers and duties." *United Cities Gas Co. v. Illinois Commerce Commission,* 163 Ill. 2d 1, 11 (1994) (citation omitted).

A review of the Act, particularly Article VIII. Service Obligations and Conditions, indicates that there are at least two bases for ICC jurisdiction in this instance. Section 8-101 requires the utility furnish such "service instrumentalities" that promote the safety, health, comfort and convenience of customers and the public, and shall in all respects be adequate, efficient, just and reasonable. 220 ILCS 5/8-101. The ICC could base a renewable portfolio standard on this provision if "service instrumentalities" is read to include supply contracts or energy certificates/credits and if it develops an evidentiary record that supports a conclusion those renewable resources are necessary for the safety, health, comfort and convenience of the public.

Another option is Section 8-401, which requires a utility provide services that are adequate, efficient, reliable and environmentally safe and consistent with these obligations, constitute meeting the utility's least cost in meeting its service obligations. 220 ILCS 5/8-401. The ICC could find that use of renewable supplies is a necessary means of providing environmentally safe services. Any such finding under this section would also have to satisfy the "least cost" statutory directive.

There are, of course, no guarantees. The General Assembly has in limited instances given the ICC directive in terms of certain supply procurement considerations. For example, in furtherance of the policy regarding encouraging alternative energy production resources, the ICC requires utilities to enter into long term contracts with qualified solid waste energy facilities. 220 ILCS 5/8-403.1. This statute provision, under the statutory principle that the inclusion of one thing means the exclusion of all others, suggests that the ICC cannot order a utility to acquire any other level or type of renewable resources. Here, the General Assembly has set out the intended public policy, engaged the ICC in furtherance of that policy, and explains in great detail how

this policy is to be implemented. Nothing of the kind is provided for in terms of renewable resources, coal, natural gas, hydro, or nuclear power, suggesting the legislature had no intention of mandating any particular level of these resources.

As previously represented, the Ameren Companies contemplate filing a tariff that supports their SEP. The Commission has broad authority to approve such a tariff under Article IX of the Act. Although the primary mechanism for setting rates has been a general rate case in which a utility submits data regarding its operating costs for a "test year," with base rates being set in absolute dollar terms that encompass all such costs and provide for a fair rate of return, *see Business & Professional People,* 146 Ill. 2d at 237-38, the Commission has never been confined to that method. Rather, it may permit a utility to adjust rates to recover unique, fluctuating, or unexpected costs pursuant to a pre-determined process, outside of a general rate case, even though the exact amounts of such costs cannot be determined at the time the rate recovery mechanism is approved.

In *City of Chicago v. Illinois Commerce Commission,* 13 I11 .2d 607, 611 (1958), the Illinois Supreme Court explicitly recognized "it is clear that the statutory authority to approve rate schedules embraces more than the authority to approve rates fixed in terms of dollars and cents, "as is done in a general ratemaking case and that an adjustment mechanism can provide a more "accurate and efficient" means than a general rate case for tracking costs and matching them with rates. *Citizens Utility Board v. ICC,* 166 Ill. 2d 111, 139 (1995).

The Commission and courts have endorsed such mechanisms in a variety of contexts. *See Citizens Utility Board, 166* Ill. 2d at 133 (upholding recovery of "coal tar clean up expenditures" through a flexible "rider" mechanism, which the court described

as a mechanism that could "increase a rate, allowing the utility to recover the cost as it is incurred, alleviating the delay of waiting until the utility files a general rate case to recover expenses "); *City of Chicago v. ICC,* 281 Ill. App. 3d 617, 627-28 (1st. Dist. 1996) (upholding rider recovery of utility municipal franchise fees); *In re Illinois Power Co.,* No. 04-1294, 2004 WL 2208508, at *47 (ICC Sept . 22, 2004) (approving automatic adjustment clause for 90% of asbestos-litigation costs). Nor are they necessarily confined to situations involving "unexpected, volatile or fluctuating" costs. *See City of Chicago,* 281 Ill. App. 3d at 627-628 (local franchise fees). The Commission also has approved other rates that have been based simply on formulas utilizing objective data, including wholesale market price data.

The tariff supporting the SEP reflects the type of costs that have been found appropriate for a special, pre-approved mechanism permitting utilities to adjust rates to recover justifiable, but presently unknown, expenditures. The question facing the Commission, then, is how to limit utilities' discretion and adequately protect consumers. The renewable procurement process incorporated in the tariff constrains such discretion by specifying exactly how the renewable resources shall be procured. Thus, ratepayers necessarily are protected, while the Ameren Companies are ensured nothing more than recovery of their actual costs.